Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 02-277
	)	
Cross-Ownership of Broadcast Stations and Newspapers	)	MM Docket No. 01-235
	)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	MM Docket No. 01-317
	)	
Definition of Radio Markets	)	MM Docket No. 00-244

Comments of
CanWest Global Communications Corp.

CanWest Global Communications Corp. hereby offers its comments on the Commission's *Notice of Proposed Rulemaking* with regard to a number of issues related to media ownership.

The company

CanWest Global Communications Corp. ("CanWest") is one of Canada's largest media companies, with holdings in television and newspapers in Canada, as well as television, radio and out-of-home advertising holdings in Australia, New Zealand, Ireland and the UK. CanWest also owns Fireworks Entertainment, a television programming and feature film production and international distribution company, with offices in Toronto and Los Angeles. CanWest's head office is located in Winnipeg, Canada, and its shares trade on the Toronto and New York Stock Exchanges.

Our interest in this proceeding

In an increasingly global media market, CanWest has ongoing commercial relationships with many U.S. broadcasters and production companies, and we are therefore interested in the future course of the rules that will impact on those companies.

In a submission to the Commission filed on December 3, 2001, we noted that the Commission's earlier *Order and Notice of Proposed Rulemaking*, adopted on September 13, 2001, made specific reference (at Paragraph 51) to decisions of the Canadian Radio-television and Telecommunications Commission (CRTC) on matters dealing with broadcast-newspaper cross-ownership.

One of the decisions referred to in that paragraph was Decision CRTC 2001-458, which dealt with the renewal of licenses for the conventional television stations owned by CanWest. In that regard, we drew the FCC's attention to the fact that, in newspaper-television cross-ownership situations, the Canadian regulatory agency had set out a self-regulatory alternative, which now is in the process of being implemented.

In the current proceeding, CanWest would like to comment further on the question of media diversity, and on the Commission's rules governing media ownership.

There is greater diversity of media today than ever before in history

The question of media "concentration" has been a matter of intense public debate, in both the U.S. and Canada. Unfortunately, it has been a debate in which many of the self-appointed critics of the media have often engaged in hyperbole instead of rigorous statistical analysis.[1]

It is the view of CanWest that, in countries like Canada and the U.S., there is sufficient diversity of media to allow the development of new kinds of media corporations that will be able to compete across multiple platforms. In our view, the marketplace is the best regulator, because media that depart from acceptable standards will do so at their peril in today's competitive multimedia environment. To the extent that there are concerns about the impact of such a policy, we would favor self-regulation instead of formal regulatory oversight.

To put it as succinctly as possible, the argument that there is media "concentration" in Canada (or the U.S.) in 2003 is one of the first great myths of the 21st Century. The media "concentration" argument is based on a false statistical premise -- that the market share of a company within a particular medium can be considered in a vacuum, without

[1] For example, a Reply Comment submission to the Commission, dated February 15, 2002, from the Consumers Union and other groups, included a statement by Mr. Stephen Kimber, a Canadian journalism professor. Mr. Kimber described CanWest's newspaper holdings as follows: "14 metropolitan dailies … the *National Post,* one of two national newspapers published in Canada … 126 smaller daily and weekly newspapers …" In other words, it was implied that CanWest owned a total of 141 daily and weekly newspapers. Those numbers are factually incorrect and vastly overstate the actual holdings of the company, then and now. At the time, according to the Canadian Newspaper Association, CanWest owned 27 daily newspapers; according to the Canadian Community Newspapers Association, the company owned 41 community papers. (The current numbers are 17 dailies and less than 40 community newspapers.) The other publications Mr. Kimber included in his total as newspapers were, in fact, mostly shoppers, (advertising free sheets) and TV listings inserts. His total even included a telephone directory. It is regrettable that some critics of the media have found it necessary to use inaccurate and misleading statistics to attempt to justify their positions.

relating the medium to other media, or to the overall size of the population or the households that are served.

We noted with interest that a number of the studies released by the FCC have confirmed that consumers in the U.S. have access to far more choices of media than was the case in the past. A similar pattern may be observed if one studies the Canadian market.

The Commission may be interested in some recent statistics from Canada that demonstrate the degree to which the media market is far more diverse today than it was in the past. The fundamental changes may be summarized as follows:

- Markets have fragmented -- consumers have more choices of more media than ever before in history

- As a response to fragmentation, media companies have attempted to re-aggregate the fragments, in order to maintain economies of scale

- However, re-aggregated fragments rarely yield the same market shares that single outlets had in the past

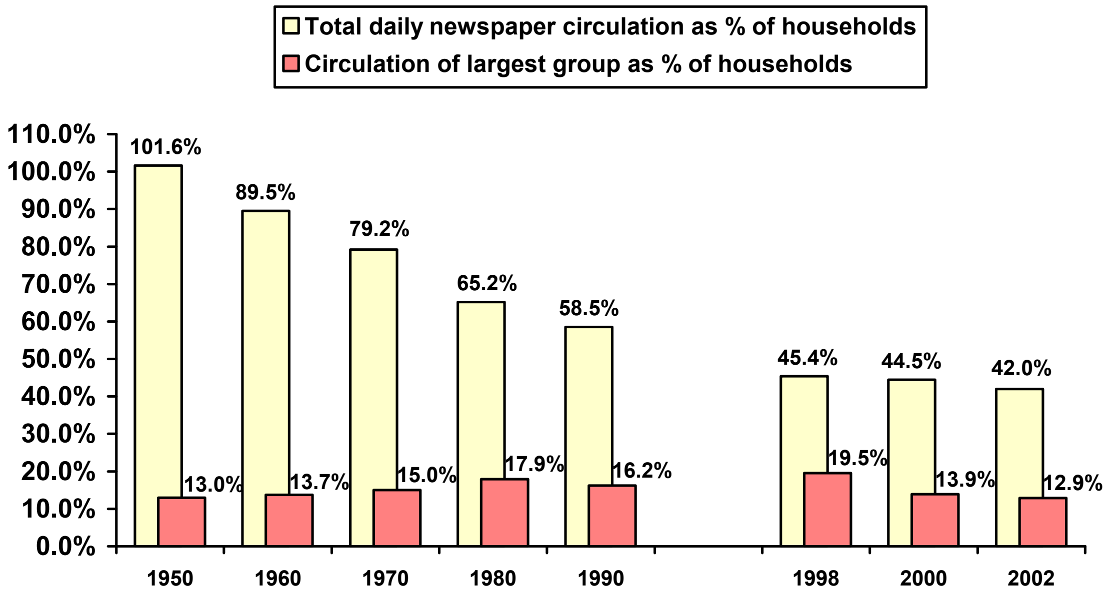
- In addition, that fragmentation is not only occurring within each specific market; increasingly, media from other markets and other countries are available to consumers, with the Internet playing a growing role in this area

As noted above, in assessing media markets, it is of fundamental importance not to view those markets in a vacuum. If one is interested in the degree to which a medium may influence public opinion, then simply looking at market shares within the medium is not enough. The relationship with households must also be considered, because that represents the relationship between the medium and society; it may also indicate that a substantial number of households are getting their information from alternate sources.

As indicated in Figure 1, when circulation is related to the number of households in Canada, the circulation of the largest daily newspaper group (by circulation) is lower today than it was in 1950 -- and also lower than in any of the intervening years shown in the chart. This illustrates the phenomenon that, even as media consolidate to counter the effects of fragmentation, they rarely achieve the market shares that single media (or smaller groups of media) achieved in the past. In this case, we can see that CanWest, with 17 daily newspapers, has a circulation/household percentage today that is lower than the largest group (by circulation) had in 1950.

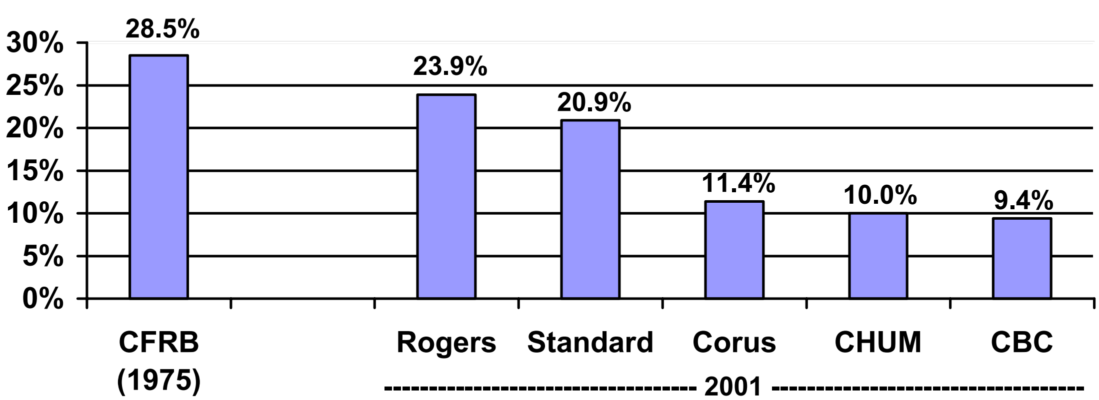
Figure 2 illustrates the same phenomenon – in this case, for radio in Toronto. It can be seen that, in 1975, CFRB -- all by itself -- had a 28.5% share of radio tuning in Toronto. Today, Rogers has four radio stations in Toronto, but the combined tuning of those four stations is still less than CFRB achieved on its own in 1975.

Figure 1.
Total daily newspaper circulation, and circulation of largest newspaper group (by circulation), as % of households in Canada, 1950-2002:



SOURCE: *Canadian Advertising* and *Canadian Advertising Rates & Data*, selected issues; Canadian Newspaper Association; Statistics Canada.

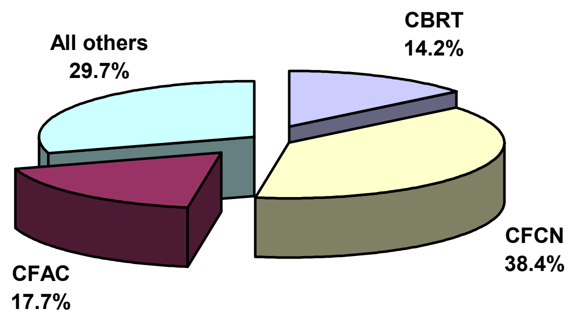
Figure 2.
Comparison of radio tuning shares, Toronto Census Metropolitan Area (all persons 12+), CFRB in 1975, and selected station groups, 2001:



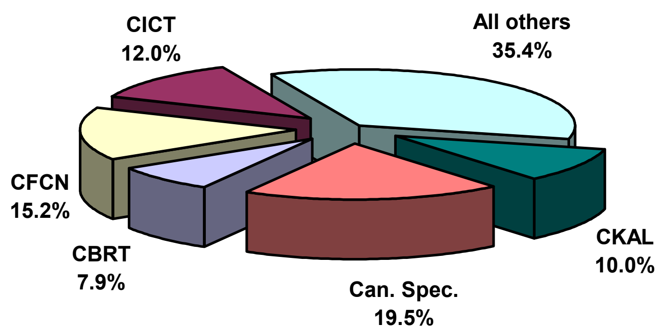
SOURCE: BBM (Fall 1975 and Fall 2001). (Note: The comparison is based on the current ownership status and Fall 2001 tuning data.)

Figure 3.
Shares of total TV hours tuned (all persons 2+), 1975 and 2000, Calgary Census Metropolitan Area:

1975:



2000:



SOURCE: BBM (Fall 1975 and Fall 2000).

In Figure 3, television viewing data are compared for another Canadian market, Calgary. The local TV stations that served Calgary in 1975 have lower tuning shares in 2000 than they did in 1975. CFCN (CTV) has gone from 38.4% to 15.2% of tuning. CFAC, now CICT (Global) has gone from 17.7% to 12.0% of tuning. A new conventional TV station, CKAL, has achieved a 10.0% share. CBRT (CBC) has gone from 14.2% to 7.9% of tuning. The combined tuning to Canadian specialty services (cable channels) is greater than the tuning share of any local station.

If the tuning shares for the specialty services (cable channels) owned by the conventional TV broadcasters are added to the totals for their local stations, the total shares would be as follows -- CTV - 19.8%; Global - 12.8%; CBC - 8.9% -- all lower shares than their conventional stations alone had in Calgary in 1975.

Similar data are available for other Canadian markets, and those data demonstrate essentially the same phenomenon – even as media consolidate to counter the effects of fragmentation, they rarely achieve the market shares that single media (or smaller groups of media) achieved in the past.

Today's media market is the richest and most diverse in the history of modern media. Cross-ownership in Canada has strengthened media companies and encouraged greater diversity and more sources of information. Experience simply does not support the contention of some opponents of cross-media ownership that consumers would have access to fewer points of view or would see only repackaged versions of the same content across multiple media platforms.

A recent example from CanWest's experience, as an owner of television, newspaper and Internet assets, was the CanWest coverage of the US-led campaign in Afghanistan. The nationally televised early evening news, *Global National with Kevin Newman*, (Newman was formally an anchor and correspondent at ABC News) on the Global Television Network had just a single Global reporter assigned to Afghanistan. However, Newman's nightly news broadcasts also had the benefit of files from journalists covering the campaign from the Washington bureau of CanWest Publications, and from reporters in Afghanistan assigned by the National Post, the Ottawa Citizen and the Montreal Gazette as well as a free lancer. We were thus able to provide our newscast with seven different angles on the unfolding story, three of which included live video feeds from the Afghanistan using state-of-the-art videophones.

It is also noteworthy that the print journalists were able to tell their stories to an additional 800,000 Canadian viewers of the nightly news who statistically were not likely to be readers of the individual newspapers that assigned the reporters. In fact, every journalist who is part of a multi-media group has an opportunity to reach exponentially wider audiences on different media. CanWest journalists now do that on a daily basis. The result is that consumers have access to more rather than fewer sources of news and information as a direct result of cross-media ownership in Canada.

We believe these data and CanWest's experience as a cross-media owner, provide additional evidence of the diversity of media choices in both Canada and the United States. We therefore agree with those who have urged the Commission to liberalize or eliminate the current broadcast-newspaper cross-ownership rules.

The question of foreign ownership

While the rules on foreign ownership are not formally part of this proceeding, we believe that the overall trends in media discussed above lead to the inescapable conclusion that the rules governing foreign ownership should also be reviewed and updated.

The historical context

It has been long standing practice in many countries, including the United States and Canada, to maintain policies, laws or regulations that limit the participation of foreign nationals or foreign-owned corporations in the ownership, direction or managerial operation of broadcast entities.

The historical motivations for such restrictions vary, but usually revolve around reserving limited broadcast spectrum to citizens of the same country. Other important considerations include national security concerns about foreign control of limited broadcast outlets, particularly in times of war. Additionally, in the case of Canada and some other countries, perceptions that ownership and control by nationals will be beneficial to the achievement of other public policy goals are an important consideration. These other goals include the promotion of distinct national cultural values and providing enhanced prospects for the broadcasting of locally produced cultural products, including the works of performing artists, and content production enterprises. These cultural policy concerns should be seen in the context of an environment in which high quality US programming content is available in abundance at prices far below the cost of producing comparable indigenous productions.

Whatever the historical justifications for restrictions on the participation of foreign nationals and foreign owned companies in the broadcast sector, CanWest believes that limits on foreign private sector investment in broadcasting companies have little merit today in the United States, in Canada or in other countries.

The old justifications for foreign ownership restrictions no longer apply

Advances in technology, including the introduction of digital transmission technologies, have essentially rendered obsolete the argument based on scarcity of spectrum.

The national security justification, based presumably on a desire to preclude access to the broadcast media on the part of foreign powers or interests that might be unfriendly or hostile to the United States, does not withstand close scrutiny. In a post cold war environment there are few of those countries. More significantly, in a universe of almost unlimited digital television channels, as well as the availability today of countless foreign radio stations, not to mention foreign newspapers on the Internet; and with Internet video streaming of programming sure to compete increasingly with conventional television broadcast stations, the existing regulatory barriers to entry of foreign news, information and entertainment signals into the homes of Americans are disintegrating rapidly. Foreign ownership restrictions on one component of the information highway would not insulate Americans from non-American points of view, even if, in a world of freedom of expression, such a goal could be sustained as a legitimate one.

Other regulatory remedies or measures in any event remain available, where necessary, to ensure that broadcasting entities provide satisfactory opportunities for the reflection of local cultural values including shelf space for locally produced content and talent.

Realistically, the motivations of broadcasters are uniformly economic. Commercial success depends entirely on providing target audiences with the programming they wish to receive. Broadcast entities owned by governments for the purpose of beaming information and propaganda to the citizens of unfriendly or hostile governments may have had an important role in war time or during the cold war, but such undertakings should not be confused with the free enterprise world of commercial broadcasting. Moreover, existing US laws that preclude eligibility for broadcast licenses of US companies in which foreign governments or their representatives have more than a 20% financial interest could be retained.

The question of a possible linkage between foreign ownership and the content delivered to consumers by broadcasters was recently studied carefully by the Australian *Senate Committee on Environment, Communications, Information Technology and the Arts Legislation* in its review of the current Australian Media Ownership Bill 2002. If enacted, that legislation would relax foreign ownership rules for broadcasting undertakings as well as cross-media ownership rules in Australia.

The issues in Australia are similar to those in Canada where some fear that opening up foreign ownership would lead to domination of the airwaves by US or other foreign interests whose programming would take precedence over locally produced productions and talent. The Australian Senate Committee felt differently about that issue. In its Report, issued in June 2002, the Committee said the following about foreign ownership and control (Paragraph 3.24):

> *"The Committee believes that in relation to foreign owner influence, it is reasonable to assume that foreign owners will be motivated to maximize profits, rather than influence public opinion. Accordingly, it is to be expected that they would provide content with the aim of maximizing consumer demand and therefore advertising revenues. There is, therefore a commercial imperative for broadcasters to include Australian content. Furthermore, it is crucial to note that this Bill will in no way alter the existing Australian content rules. The Committee therefore considers that concerns about a diminution of locally produced programming should this Bill proceed are unfounded."*

<u>The FCC Biennial Regulatory Review and the multilateral trade in services negotiations underway in the WTO provide a timely occasion to review foreign ownership rules for broadcasting</u>

CanWest believes that existing US legislation as it relates to foreign ownership rules in the broadcasting sector, including the way in which those rules have been interpreted and administered by the FCC over the years, should be included in the current regulatory review.

The relevant US provision, Section 310(b) of the Communications Act, provides the FCC with authority to determine the permitted level of foreign ownership of an American Corporation engaged in broadcasting. Sub-paragraphs (1) and (2) explicitly deny broadcasting licenses to non-US nationals (aliens) or corporations that are organized under the laws of any foreign government. Sub paragraph (3) denies broadcasting licenses to any US corporation in which more than 20% of the capital stock is owned or voted by non-US nationals, representatives of non-US nationals or by any foreign government or by any corporation organized under the laws of a foreign country. Clearly legislation would be required to amend any of those requirements.

CanWest believes there is no longer any reasonable public policy justification for the requirement that US-based companies, in which foreign nationals or corporations have an equity position higher than the current 20% limit, set out in section 310(b)(3), are precluded from holding a broadcast license.

In Canada, the current laws permit foreign-based interests, private or corporate, to have a financial interest in Canadian broadcasting licensees of up to the aggregate of 20% direct investment and 33⅓% indirect investment, for a theoretical total foreign ownership limit of 46.7% in voting equity. Non-Canadians are permitted to acquire unlimited amounts of non-voting equity. CanWest has recommended to the government of Canada that the upper limit be raised to 49% in any combination of direct or indirect investment.

The current language of 47 U.S.C. 310(b)(4) extends a measure of flexibility to the Commission to allow greater foreign ownership of a US broadcaster provided that the ownership is retained indirectly by a holding company. Section 310(b)(4) reads as follows:

> **"No broadcast …license shall be granted to or held by--**
> *(4) any corporation directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives or by a foreign government or representative thereof, or by any corporation organized under the laws of another country, **if the Commission finds that the public interest will be served by the refusal or revocation of such license"** (emphasis added)*

Section 310(b) sub-paragraph (4) has been interpreted over the years as placing an automatic ceiling of 25% on the total level of foreign ownership of an American holding company with an interest in a corporation that holds or applies for a broadcast license, so that any ***applicant is required to prove*** to the Commission that the grant of a waiver of that ceiling in respect of a specific foreign ownership transaction would be in the public interest.

Contrary to that interpretation and practice, a plain language reading of sub-paragraph (4) indicates clearly ***that it is for the Commission <u>to find</u> "that the public interest will be served by the refusal or revocation of such license."***

J. Gregory Sidak , F.K.Weyerhauser Fellow in Law and Economics at the American Enterprise Institute for Public Policy Research in Law and Economics, submitted a learned opinion on behalf of CanWest Global Communications Corp. to then FCC Chairman, The Honorable William E. Kennard, on May 11, 1998. In that opinion, Mr. Sidak concluded that *" …the legally correct reading of Section 310(b) 4 provides that CanWest Global may exceed 25% indirect ownership of an American broadcast licensee unless the Commission can carry the burden of proving that denying CanWest Global the right to own more than 25 percent of an American broadcaster would serve the public interest. Nothing in the materials I have reviewed for purposes of rendering this opinion remotely suggests that the Commission could successfully make such an evidentiary showing."*

In other words, flexibility already exists under U.S. law to permit foreign ownership of greater than one fourth of a US-based holding company that directly or indirectly controls a corporation that in turn owns or has applied for a broadcast license. Moreover, that flexibility should, on the plain language of the provision, apply automatically, with deviation occurring only in those circumstances when the FCC itself determines, through an appropriate due process, after the fact, that the indirect holding of a license by a corporation in which the foreign ownership exceeded 25 % is not in the public interest.

As Mr. Sidak pointed out in his letter to Mr. Kennard, that interpretation has been variously supported by senior members of the House and Senate and in statements made by the US Trade Representative and US negotiators at the WTO negotiations on Trade in Services in 1997.

It is noteworthy that legislative and regulatory reviews with respect to broadcasting, or more generally with respect to media, are underway in a number of countries including Britain, Australia and Canada. All are examining the merits of relaxation of, if not elimination of, restrictions on foreign ownership.

It is also relevant that multilateral trade negotiations now underway in the WTO provide an opportunity for like-minded countries to reduce or eliminate foreign ownership restrictions in the broadcasting sector in concert and on a reciprocal basis. CanWest has encouraged the Government of Canada to proceed in that direction in the WTO. CanWest urges the United States Government, as the traditional champion of open markets and of national treatment for foreign investors in all countries, including the US, to take a leadership role in the negotiations in the WTO to seek inclusion of foreign ownership rules for the media, including broadcasting media, on the WTO negotiating agenda and to pursue a liberalization objective.

CanWest believes that relaxation of foreign ownership rules would be in the US as well as the Canadian interest. While more liberal foreign ownership rules in the broadcasting sector would provide Canadian and other foreign media companies with new opportunities to grow through forging strategic alliances with US partners, international liberalization would similarly provide potentially much greater opportunities for US media companies to expand in world markets.

It is important to recognize that relaxation of the foreign ownership rules would not, in the end, detract from the ability of the Commission to ensure that license holders, whether, wholly US owned, or partially or even totally owned by foreign-based interests, serve the US public interest. The ultimate sanction of removal of the broadcasting license would remain in the hands of the Commission in those unlikely circumstances where a license holder does not serve the public interest.

Recommendations with respect to foreign ownership

1) That the FCC broaden the scope of its 2002 Biennial Regulatory Review to address the interpretation of 47 U.S.C. 310 (b) (4) with a view to adopting the interpretation supported by many, that would place the burden on the FCC rather than the applicant, of proving that an indirect foreign investment of greater than 25% in an American broadcast licensee would be harmful to the public interest.

2) That the FCC review possible amendments to 310b (3) and (4) that would raise the permitted threshold for direct and indirect investment by citizens of foreign countries and by foreign-based corporations in US corporations that own or apply for broadcast licenses to at least 49%. Current restrictions on investment by foreign governments or their representatives could remain unchanged.

3) That the FCC encourage the US Trade Representative to pursue liberalization of foreign ownership in the broadcast sector, and the media in general, in the current round of multilateral trade negotiations under the auspices of the WTO

A final word

As the U.S.A.'s closest friend and largest trading partner, Canada shares many of the same concerns and issues. While we appreciate that the Commission's deliberations will deal specifically with these issues in an American context, we trust the Commission may find these comments useful.

Respectfully submitted,

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Dated: January 2, 2003